

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

ORIGINAL

75-7693
76-7023

United States Court of Appeals
FOR THE SECOND CIRCUIT

TERRY GILLIAM, GRAHAM CHAPMAN, TERRY
JONES, MICHAEL PALIN, JOHN CLEESE and
ERIC IDLE, individually and collectively perform-
ing as the professional group known as "Monty
Python,"

Plaintiffs-Appellants-Appellees,

v.

AMERICAN BROADCASTING COMPANIES, INC.,

Defendant-Appellee-Appellant.

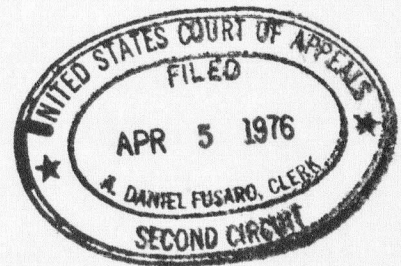
INTERLOCUTORY APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF AND APPENDIX FOR DEFENDANT-
APPELLEE-APPELLANT**

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STATEMENT OF FACTS

This is an interlocutory appeal by plaintiffs (No. 76-7023) from the December 19, 1975 decision of the United States District Court for the Southern District of New York, Hon. Morris E. Lasker, District Judge, denying their motion for a preliminary injunction essentially seeking to restrain defendant from broadcasting any of the materials written or performed by plaintiffs for the British Broadcasting Company ("BBC").

By supplemental order dated December 22, 1975, Judge Lasker restrained defendant from proceeding with its broadcast scheduled for December 26, 1975 unless it ran a visual and vocal disclaimer stating that plaintiffs did not associate themselves with, or approve of, the program. Defendant appealed from the supplemental order and on December 23, 1975 by order of this Court that order was stayed pending appeal. Since the December 26 program has already been telecast, that appeal (No. 75-7693) is now moot.

The six plaintiffs in this action, comprised of one American and five Englishmen, professionally perform as a group called "Monty Python." They entered into separate writers' (Plaintiffs' A. 29, 37) and performers' agreements

(Defendant A. 3)*with the BBC. Under the scriptwriting agreement, plaintiffs were to write six 30-minute scripts for a television series called the Monty Python Show, to be directed and produced by the BBC. Under the performer's agreement, they were to render performances for recording by the BBC based on the aforesaid scripts.

Under the writer's agreement, ¶I(3), the BBC was given, among other things, the right to televise the recordings of the scripts (or work) and "the exclusive right to transmit or to license the transmission of recordings of the work in any overseas territory . . .," including the United States.

The agreement further provides, in ¶5, that the

"BBC shall at all times have the right to make... such ... alterations as in its opinion are necessary in order to avoid involving the BBC in legal action or bringing the BBC into disrepute."

While the writers are given the opportunity to consult and advise on such changes, "If there is no agreement about the alterations, then the final decision shall rest with the BBC." The writers are also given the opportunity to participate in other script changes prior to recording, provided again that the final decision shall rest with the BBC.

* Although only one of the performer's agreements, with plaintiff Gilliam, was introduced in evidence, Gilliam testified that he believed it was "identical to the one that Mike [Palin] has" Tr. 86. Presumably the remaining plaintiffs also had "identical" performers agreements.

Under the performer's agreement (Defendant's A. 3) the plaintiffs agreed to perform for the BBC from the scripts delivered (§2), and gave the BBC the right to make recordings of their performances* (§11). As in the writers agreement, BBC is granted a similar option to acquire rights "to transmit or authorize the transmission of the recordings from any transmitter to any part of the world other than the United Kingdom." (§11(g)). The BBC is also given the right to broadcast extracts from the recordings on various types of other programs and for various other purposes. (§11(b), (d)). The performers agreement further sets forth a warranty by the signatory-plaintiff that he is at liberty to use any manuscript or unpublished work provided by him for all purposes of the agreement. (§14a).

Pursuant to its authority under both agreements with plaintiffs, BBC contracted with Time-Life Films ("Time-Life") for the latter to act as its U.S. distributor. (BBC/Time-Life agreement, Plaintiffs A. 134). Paragraph 9 of that agreement provides in relevant part, as follows:

"Time-Life Films will not be permitted to adopt, edit or otherwise abridge or alter any BBC programs without the consent of [BBC] except for insertion of commercials, applicable censorship or governmental (such as the Federal Communications Commission) rules and regulations, and National Association of Broadcasters and time segment requirements." (Emphasis supplied)

* "Recordings" are defined in §1 as "any contrivance whereby the performance may be mechanically reproduced."

Pursuant to the authority granted it by the BBC, Time-Life thereafter entered into an agreement with ABC (Plaintiffs' A. 49) to deliver to the latter two 90-minute specials "to be compiled and edited from six one-half hour Monty Python Shows, previously screened for ABC, which have not been exhibited in the United States." (¶1).

The Time-Life- ABC Agreement further provides as follows:

"4. The programs are to be edited to ABC's Wide World of Entertainment format, and the main titles for each of the programs shall appear at the beginning of the program. ...

* * *

"6. The programs will be edited and otherwise made to fully conform to the policies of ABC's Department of Broadcast Standards and Practices ... In the event that ABC's Department of Broadcast Standards and Practices does not approve and pass a quantity of material sufficient to constitute two 90-minute show, [Time-Life] will deliver and ABC will accept, in lieu thereof, one 90-minute show."

Consistent with ABC's "ultimate legal responsibility" to "program in the public interest, convenience and necessity," Tr. 125, in conformity with the policies of its Department of Broadcast Standards and Practices "to exercise a responsible judgment on the program material that ABC puts on the air," (Tr. 126), ABC made certain requests for changes in the basic editing done by Time-Life (Tr. 169-173). Deleted were repeated graphic sexual references, scenes of nudity and other material offensive to mass audiences. (A description of the materials deleted,

Plaintiffs' Ex. 10, appears at Plaintiffs A. 129). Omitted were such phrases as "The story of one man's love for another in drag," "The secret love for bisexuals," a scene depicting special gaiters presented to a soldier by his regiment for sexually obliging them, words such as "intercourse," "pert thighs," several references to "erogenous zone," and "tit-tit-tit Tinny." Other deletions included repeated graphic references to love making accompanied by such dialogue as "She's all ready for it," "Great big tits," "Got her legs up on the mantelpiece," "You've got your tongue down her throat," and "You've got her sweater up." Also cut was a scene of a number of people in bed watching a television program in which Ophelia says to Hamlet, "Got a girl in bed, her legs up on the mantelpiece," and other scenes again referring to "girl on the couch, legs on the mantelpiece."

Virtually all of the scenes cut, with minor exceptions, were those considered totally unacceptable for commercial television by the Standards & Practices Department (Tr. 174-175). In addition to those described above, these included a military trial sequence with shots of men showing their backsides to the camera accompanied by obscene arm gestures, members of a military court with their backsides to the camera, shots of a naked man playing the piano, a cartoon sequence involving a naked woman and an exploding woman, and a visual scene of a man dressed as a doorman fondling under the skirt of a woman.

Other cuts removed material such as offensive references to handicapped individuals, language such as "up your mother's next door," repeated scenes of a woman remotely controlling television through a man dressed in Indian garb who through increasingly violent electrical shocks is forced to change channels, and a sequence involving a headless fighter cut to eliminate a close-up of a scene of the head and a second head being brought in in a bag, and a fight between hospital patients and attendants in a hospital. Repeated references to homosexuality were also removed.

Typical of the remaining cuts, of a merely incidental nature, were those designed for continuity reasons and program identification, required when three 30 minute-shows are compiled into one 90-minute special. (Tr. 171-172, 174). Thus, for example, the main title lead in the first show was moved up to the beginning for identification purposes (Tr. 172), and the program identification opening in the second script was deleted as unnecessary (Plaintiffs' A. 131, ¶15).

Plaintiffs were aware prior to the October 3, 1975 airing of the first special that three episodes would be compiled into one 90-minute special (Tr. 103) and were aware soon thereafter that it had been edited (although Mr. Gilliam claimed not to "know precisely" when (Tr. 105, 106). Mr. Gilliam clearly recognized the difference between non-commercial television in the United Kingdom and commercial television standards in the United States (Tr. 79-80), which

require editing both for content and for commercial sponsorship. Approximately a month prior to the first showing, the plaintiffs' English representative specifically inquired of the BBC regarding commercial breaks and was advised they would occur. On September 5, 1975, Jill Foster, the plaintiffs' London representative, wrote to the BBC stating that "in my bath yesterday, it occurred to me that out of this ABC slot of ninety minutes, something in the region of twenty-four minutes will be devoted to commercials" (Plaintiffs' A. 127). The BBC replied, on September 12, 1975, acknowledging that commercial breaks would be made of a length which it was unaware of (Plaintiffs' A. 128).

Nancy Lewis, the plaintiffs' American manager who had initially approached ABC about buying the Monty Python programs (Tr. 160), sent a cable from London (Defendant's A. 1) which Mr. Robert Shanks, Vice President of ABC Entertainment for early morning and late night programming, received in New York on Friday, November 21, 1975, inquiring as follows:

"Has editing been done for second Monty Python Wide World Special (STOP). If so, may we screen results with London or if not yet done, Pythons would like to edit for you . . ."

Shortly thereafter, in a telephone conversation with Ms. Lewis, Mr. Shanks acknowledged receipt of the cable. (Tr. 159). Although Ms. Lewis testified that Mr. Shanks stated that the show had been edited and would be made available to plaintiffs (Tr. 38), Mr. Shanks recalled that particular

conversation as one in which Ms. Lewis gave "no indication . . . that there was any difficulty" about viewing the tape. (Tr. 160). As he stated to Ms. Lewis over the telephone (Tr. 159-160), and confirmed in his reply telegram to her, the tape would only be available through Clare Simpson of Time-Life, the supplier of the program, who would be in London on December 1st. (Tr. 159). As Mr. Shanks explained, when questions arose concerning programs provided by outside suppliers, the matter is routinely referred back to that supplier, which in this case was Time-Life. Mr. Shanks never refused to make any cassette or tape of the show available although, as he explained, providing the finished tape which ABC had would have been meaningless. American technical systems are different from those used in England and the tape produced in America could not have been screened in England without a conversion, which was part of the obligation of Time-Life as the producer and editor of the tape. (Tr. 159-160). Following Mr. Shanks' reply telegram in confirmation of the call, he heard no further from Nancy Lewis. (Tr. 161).

Approximately three weeks thereafter, on December 15, 1975, only eleven days before the Monty Python Special was scheduled to be broadcast, plaintiffs commenced this action and sought a preliminary injunction. They then alleged, for the first time, that ABC had no right to edit the scripts for commercial broadcasting in the U.S. (Complaint, ¶¶7-8, Plaintiffs' A. 3) and that ABC had no right whatsoever "to

alter the scripts of plaintiffs [sic] for television purposes." (Osterberg Aff., ¶3, Plaintiffs' A. 28).

ARGUMENT

POINT I

PLAINTIFFS ARE GUILTY OF LACHES BY THEIR
INEXCUSABLE DELAY IN COMMENCING THIS ACTION
ONLY ELEVEN DAYS PRIOR TO TELECAST OF THE
PROGRAM SOUGHT TO BE ENJOINED

As Judge Lasker noted in denying the preliminary injunction, "there is a somewhat disturbing casualness with which the plaintiffs pursued this matter until they brought it to Court."

(Tr. 202). While the District Court at that point was referring only to events prior to the end of November 1975, matters which have developed subsequent to the hearing strongly indicate that plaintiffs' bona fides in seeking extraordinary relief is highly suspect.

As noted above, this action was commenced on December 15, 1975, purportedly to enjoin defendant's telecast of a Monty Python special scheduled for December 26, 1975, because that show had edited out certain material. Yet, by her own admission in a letter to the BBC dated August 1, 1975, Jill Foster -- plaintiffs' English representative -- confirmed that she was aware, as early as June 9th, that ABC had entered into a deal for telecasting two ninety-minute compilations made up of six Monty Python episodes. (Plaintiffs' A. 125). As representative for the plaintiffs, Ms. Foster surely recognized -- as does anybody having the slightest involvement with American television -- that the uniform practice of American network broadcasting is to have programs sponsored by advertisers and to have commercial messages inserted in such

programs. By such practice, a typical ninety-minute show, after editing, will have substantially less than ninety minutes of actual programming, a significant portion of such ninety minutes being set aside for commercials. Thus, notwithstanding Ms. Foster's statement to the BBC in her August 1, 1975 letter that "I assume that the programmes are made up of all six episodes . . . and that no alterations have been made to them" she finally concedes in her September 5, 1975 letter to the BBC: "it occurred to me that out of the ABC slot of ninety minutes, something in the region of twenty-four minutes will be devoted to commercials. How then I wonder can each episode be shown in its entirety." (Plaintiffs' A. 127). In view of this clear acknowledgment by Ms. Foster that little more than two-thirds of the ninety-minute Monty Python program will actually be shown (i.e., sixty-six minutes of the ninety-minute show), the BBC responded by letter dated September 12, 1975:

"We do not know the situation regarding the length of commercial breaks that ABC intend to make, nor indeed if the programme is receiving sponsorship as opposed to spot advertising. We can only reassure you that ABC have decided to run the programmes 'back to back', and that there is a firm undertaking not to segment them." (Plaintiffs' A. 128).

Although endeavoring to couch her September 5th letter as an idle thought, Ms. Foster was obviously aware of the American practice of commercial broadcasting. Indeed, while she states that "something in the region of twenty-four

minutes will be devoted to commercials," exactly twenty-four minutes of commercials were in fact inserted in the December 26th telecast (Tr. 158), a point Ms. Foster presumably knew all along and which would be known to a person conversant with commercial advertising practices. In short, Ms. Foster and her clients were well aware that in arranging for telecasting of a ninety-minute Monty Python compilation on a commercial television network, deletions of approximately one-third of their material would be required just for the purpose of accommodating commercials.

Moreover, Nancy Lewis, the plaintiffs' American manager (who can hardly be said to be less than totally conversant with American television), first approached ABC as long as two years before this action was commenced, to sell the Monty Python program to it. (Tr. 160). In the ensuing two years, plaintiffs' representative surely realized that in selling their ninety-minute program to an American network, substantial deletions would be required to conform to American commercial broadcast practices. Directly pertinent to this point, the first special was telecast on October 3, 1975, and Ms. Lewis was apparently aware of it at that time (Tr. 31) as were the plaintiffs themselves. (Tr. 103). Specifically, Mr. Gilliam admitted not only to knowing of the October 3rd broadcast, but also that he knew it had been edited, although he claimed not to "know precisely" when he discovered this. (Tr. 105).

To the extent plaintiffs or any of their representatives were in any way concerned with the content of these ABC specials, they certainly would have viewed the October 3rd broadcast and registered an immediate protest. Nothing of the kind occurred. Rather, it was not until the latter part of November -- almost two months later -- that any inquiry regarding the status of the program was made. Only then did Ms. Lewis cable ABC and inquire into the status of editing of the second special. (Defendant's A. 1). In that cable, Ms. Lewis inquired: "Has editing been done for second Monty Python Wide World special (stop) If so, may we screen results in London or if not yet done, Pythons would like to edit for you." By this cable, the plaintiffs again -- comparable to Ms. Foster's earlier acknowledgement -- explicitly recognized that editing was to be done on the program and -- most significantly -- acknowledged that such editing may have already been accomplished.

Notwithstanding their recognition and acquiescence for a substantial period of time that editing of the ninety-minute special was required, plaintiffs nonetheless commenced this lawsuit for injunctive relief on December 15, 1975 (only eleven days prior to the scheduled date of the second telecast) and, in part, submitted an affidavit to the District Court whereunder their attorney summarized the plaintiffs' highly suspect position that their agreements "preclude the making of cuts in the material by defendant for broadcast

purposes, for any reason whatsoever." (Plaintiffs' A. 28). Accepting Jill Foster at her word, she recognized that approximately one-third of a ninety-minute program would have to be cut to accommodate twenty-four minutes. Clearly, therefrom, no agreement authorizing telecast of such programs by ABC could fail to contemplate editing for commercial insertions. At the very least, there is a serious question as to the bona fides of plaintiffs' position that strongly compels the inference that this lawsuit was started -- not for the purpose of resolving a good-faith dispute -- but rather to apply leverage against ABC on the eve of its telecast.

Moreover, the plaintiffs' actions subsequent to denial by the District Court of their motion for an injunction compellingly demonstrate a transparent lack of concern for proceeding with this claim. Upon Judge Lasker's issuance of his supplemental order dated December 22, 1975, requiring ABC to announce a disavowal by plaintiffs in its December 26th broadcast, defendant immediately sought expedited relief before this Court to protect its interests in said broadcast. Defendant's application resulted in the Court staying Judge Lasker's supplemental order, thus permitting the December 26th broadcast to proceed and rendering such order moot. Plaintiffs, however, sought absolutely no comparable expedited relief from this Court with respect to the December 26th telecast and waited until January 5, 1976 to file their notice of appeal from the District Court's denial of injunctive relief,

which was principally directed to a telecast which had been completed ten days prior thereto.

Similarly, examination of the District Court docket would reveal that in the three months since injunctive relief was denied, plaintiffs have done nothing to join the BBC and Time-Life as parties -- one of the very grounds for denying such relief -- and have unilaterally defaulted in appearing for their depositions without ever seeking protective relief. Thus, rather than proceed with discovery at which the complex issues of fact referred to by Judge Lasker and briefed herein could be explored and resolved, plaintiffs instead have chosen to continue at their lethargic pace and literally do nothing to advance the case to trial.

Since ABC has made a substantial investment in acquiring the Monty Python specials and plaintiffs have uniformly shown a dilatory and marginally suspect attitude in asserting their claim, it is clear that the equities mandate against issuance of injunctive relief, precisely as the District Court had determined.

POINT II

PLAINTIFFS HAVE NO BASIS FOR
ASSERTING ANY CLAIM OF COPY-
RIGHT INFRINGEMENT, VIOLATION
OF THE LANHAM ACT OR UNFAIR
COMPETITION

- a. Plaintiffs' contracts with the BBC fully
allow for editing for U.S. commercial
television.

Although plaintiffs concede that the BBC is the copyright owner of the recorded performances which bear the BBC's copyright notice (Plaintiffs' Brief, p. 20), they nevertheless claim that their own copyrights in the scripts are infringed by the BBC's license to defendant, through mesne assignment, to edit the recordings for exhibition on American commercial television.

A review of the agreements between plaintiffs and the BBC reveals that the BBC had unfettered control over the recordings and unfettered authority to license telecasts of the recordings in the United States, where editing for commercial television is required. Plaintiffs, respectively, each entered into two separate and distinct contracts with the BBC; the first was a scriptwriter's agreement (Plaintiffs' A. 29, 37), and the second was a performer's or artist's agreement (Defendant's A. 3).

Pursuant to the scriptwriter's agreement, (Plaintiffs' A. 29), the BBC acquired the exclusive right to televise performances of the script over its own transmission facilities, ¶I(1), (2)

" The exclusive rights to transmit or license the transmission of recordings of its work in any overseas territory . . . " ¶I(3)

The United States is specifically listed as one of the overseas areas included. (¶ I(3)).

While plaintiffs are given certain rights to participate in revisions and alterations to the script, ¶ V, it is clear that such rights are limited to revisions and alterations in the script prior to the "rehearsals and rendering" of the same and are in no way related to the recorded television episodes which are produced. In fact, the rights of parties under nearly identical circumstances have been construed in McGuire v. United Artists Television Productions, Inc., 254 F.Supp. 270 (S.D.Cal. 1966). In McGuire, the plaintiff, a writer, director and producer of films for television, transferred all of his right, title and interest in a motion picture he wrote and produced for television, without reserving to himself "creative control" of the film. After the film was delivered, it was discovered that sufficient space had not been allocated in the film for commercials desired by the

sponsor, and that portions of the film would have to be "cut" (deleted). Before the film was aired, the plaintiff commenced an action in which he sought a court order restraining its exhibition unless the film would be shown exactly as he had produced it. In its decision, denying the injunctive relief which the plaintiff sought, the Court noted that the plaintiff did not reserve "creative control" to himself, though the defendant had been willing to give him some measure of creative control and there had been negotiations on the point. The McGuire Court thus found itself faced with the question of defining "creative control" in an instance almost on all fours with the present case, where such right had not been expressly defined. There, the Court construed the term as follows:

"The ordinary meaning of the phrase would seem to be 'control of the creation.' When a film has been 'created'--that is, when it has been authored, filmed, edited, dubbed and finally put 'in the can' ready for distribution for showing, its 'creation has been completed and finished,' and 'creative control' ordinarily has come to an end. Whether there is further 'creative control' is to be determined by agreement between the parties.

This Court does not now reach a definition of nor place a limitation upon the term 'creative control,' for in the transaction at bar the parties never came to a meeting of the minds and never arrived at a mutual consent to or understanding of the meaning or scope of the term.

There is no doubt that creative control does exist in the industries involved in this action, but what it is and to what extent it applies is

illusionary in the negotiations between the parties at bar. As a result, judgment must be for defendants on the issues presented." 254 F.Supp. at 271-72.

In the present case, the recordings were, to use the terminology of the McGuire decision, "finally 'put in the can' ready for distribution for showing." Likewise, the Pythons --having made no reservation of their rights--lost creative control over the cutting of the recordings for commercials, precisely as the plaintiff in McGuire had.

The distinction between the script and the recorded program--which plaintiffs totally overlook--is made clearer still by the very existence of the separate performer's agreements, as well as by their terms. The performer's agreement (Defendant's A. 3) begins by clearly delineating the distinction, defining "recording" as "any contrivance whereby the performance(s) may be mechanically reproduced." (Paragraph I.) The performances, of course, are the visual capturing and rendition of the materials contained in the scripts. The performer's agreement goes on to grant the BBC the right to make recordings of the plaintiffs' performances and places absolutely no limitations on use of such recordings, except as to limits on the number of broadcasts. Thus, only one or two broadcasts may be made by the BBC--depending upon the fee paid--

except that BBC may additionally use the recordings for its private purposes and in using extracts of the recordings in historic or reminiscent programs. In particular, paragraph 11 provides as follows:

"11. The BBC shall be entitled to make recordings of performance(s) or of any rehearsal and of performance(s) or interviews specifically given for use as trailers and without further payment:

(a) to use the recordings for its private purposes;

(b) to broadcast extracts from the recordings in programmes of an historic or reminiscent nature;

(c) to broadcast either the performance(s) or recordings thereof once only;

(d) to broadcast as trailers extracts from recordings and/or 'live' extracts from any rehearsal and/or recording period and

upon payment of an additional fee as provided overleaf and in the BBC's Agreement(s) with Equity: -

(e) to broadcast the recordings twice only during a period of two years from the date of any broadcast under sub-clause (c) of this clause;

(f) to broadcast as trailers 'live' and/or record for later broadcasting performance(s) given specially for trailer use on any day in respect of which no payment for rehearsal and/or recording would otherwise be due to the Artist; . . ."

Subparagraph (g) authorizes licensing of the recording outside of the United Kingdom, and provides as follows:

"(g) to transmit or authorize the transmission of the recordings from any transmitter to any part of the world other than the United Kingdom or to show or authorize the showing of the recording to non-paying audiences throughout the world subject to any limitation in the Agreement(s) between the BBC and Equity for the time being in force and for the BBC's purposes to substitute (if required) for the Artist's voice the voice of any performer in any language other than that in which the performance was given . . ."

The license to transmit thus granted would be meaningless if not accompanied by full rights in the materials used in the performances, which plaintiffs granted the BBC as follows:

- "14. (a) The Artist hereby warrants that any manuscript or unpublished work . . . and/or other programme material whatsoever provided by the Artist for his performance shall unless otherwise agreed by the BBC be either: -
- (i) original material of his own which he is fully at liberty to use for all purposes of this Agreement without the license or permission of any other person; or
 - (ii) original material which he is fully at liberty to use for all the purposes of this Agreement by reason of his holding all necessary licenses or permissions. "
(Emphasis supplied.)

In the grant of rights to exhibit the recordings in the United States--accompanied by plaintiff's warranty that they are "fully at liberty to use" their scripts "for all purposes of the [performer's] Agreement" granting those rights--there is implicit the right to edit for commercial television. The contract can have no other meaning, for the power to license in the United States would be utterly meaningless without the right to edit to conform the recording to American commercial

television practices. This is further confirmed by the notable absence of any of the restrictions on the right to so edit which plaintiffs are now so anxious to assert, in contravention of the principles set forth in McGuire, supra.

- b. Plaintiffs had to have expected that deletions would be made in the recordings to conform them for use on U.S. commercial television.
-

Even beyond the unequivocal terms of the BBC contracts, plaintiffs clearly demonstrated through their representative that they knew the recordings would be edited for commercial television soon after defendant acquired its rights to the programs, and fully recognized both the necessity of such editing and defendant's right to do it, as set forth in Point I hereof.

Not only must the plaintiffs and their agents have been aware that adaptation of the recordings to U.S. commercial network television would require cuts to permit the inclusion of commercial messages; they must also have known that U.S. network broadcast standards would not permit the airing of the prurient, scatological, homosexual, sadistic and otherwise offensive references interlarded through the recordings. It is patently obvious that the plaintiffs and their agents must

have expected such cuts quite apart from the anticipated cutting to allow commercial messages, and thus any argument plaintiffs would now make to the contrary is simply an imposition upon the credence of the Court.

With respect to the inherent right to edit for commercial network television, these same points were driven home to Otto Preminger, who sought to enjoin the edited television broadcast of his film, ".natomy of a Murder," upon the same grounds as plaintiffs here rely, in Preminger v. Columbia Picture Corporation, 49 Misc.2d 363, 267 N.Y.S.2d 594 (Sup.Ct. 1966), aff'd 25 App.Div.2d 830, 269 N.Y.S.2d 913 (First Dep't 1966), aff'd 18 N.Y.2d 659, 273 N.Y.S.2d 80(1966). There, the plaintiffs had entered into a contract with the defendants licensing the plaintiffs' rights in the film to the defendants. That contract gave the plaintiffs the right to "finally" cut and edit the original production of the film, but also contained a clause specific to television showing, in which no such right was reserved by the plaintiffs. The Court determined that the latter clause was controlling, and accordingly denied the plaintiffs' application for injunctive relief. Reviewing the testimony at the trial, the Court held that it demonstrated that

" . . . at least for the past fifteen years, the right to interrupt the exhibition of a motion picture on television for commercial announcements and to make minor deletions to accommodate time segment requirements

or to excise those portions which might be deemed, for various reasons, objectionable, has consistently been considered a normal and essential part of the exhibition of motion pictures on television.

Implicit in the grant of television rights is the privilege to cut and edit." 267 N.Y.S.2d at 599-600.

As in Preminger so also in the instant case, the editing of a work to bring it within the parameters of both broadcast standards with respect to objectionable matter and commercial feasibility must be anticipated by the proprietor who licenses it to be shown on commercial network television. Such a compromise must necessarily be part of the decision to so air a work. Taking the instant case as an example, the nationwide audience reached by defendant's broadcast over the ABC network of more than 200 stations was never before accessible to plaintiffs; hence, their suggestion that they lost rather than gained public attention and recognition, (Tr.65-66), is more than speculative--it is a misconception. On that very point, the Court in Preminger noted that

"Should a viewer resent the fact that a film is interrupted to often for commercials, and assuredly many do, this resentment would be directed at the station or the sponsor of the program. It is difficult to conceive how such resentment would be directed at the film's producer or director." 267 N.Y.S.2d at 602

In fact, no viewer dissatisfaction or complaints were expressed to defendant in connection with its showing of the program. (Tr. 162).

The nature of the cuts made by defendant has already been discussed in the Statement of Facts herein, at pages 4 through 6, and need not be repeated here. It is sufficient for this discussion merely to note that in large part they contained prurient, scatological, homosexual, sadistic and otherwise offensive references which were not within commercial network broadcast standards. For plaintiffs to argue that the deletions in the various sketches constituted a mutilation of their work is for them to argue that their work would have been mutilated by the elimination of material which was offensive or objectionable and, thus, such an argument turns upon itself, for if the plaintiffs or their agents considered the inclusion of such matter necessary to the presentation of their programs, then they might have done better to have reconsidered airing their programs over a commercial television network.

- c. By licensing for broadcast on American commercial television, plaintiffs' consented to that which they now claim is misrepresentative of their work.

As set forth above, plaintiffs' clearly consented to the broadcasting of the recordings which they now claim violate both the Lanham Act and the law of unfair competition. The frivolousness of these allegations is highlighted by the totally inapplicable authorities plaintiffs rely on.

Typical is Geisel v. Poynter Products, Inc., 283 F. Supp. 261 (S.D.N.Y. 1968), (Plaintiffs' Brief, p. 29) where defendant marketed, under plaintiffs' name, wholly new, independent creations of his own design which plaintiff had in no way participated in. Following the granting of a preliminary injunction, however, defendant revised its marketing practices by advertising its product as "based upon" plaintiff's creations, just as defendant ABC prefaced its broadcast of December 26 with the legend "Edited for television by ABC."* The Geisel court, in its subsequent opinion which plaintiffs ignore, 295 F.Supp. 331 (S.D.N.Y. 1968), held that there was no actionable deception or confusion where the product was accurately identified as "based on" plaintiff's creations. Nor is there any such actionable wrong here, where defendant has clearly notified the viewing public that the broadcast is based on plaintiffs' materials, as edited by defendant for commercial television.

*Rebroadcast, any future showings of the subject program will bear the same prefatory statement accurately describing the shows.

Contrary to the situation in Granz v. Harris, 198 F.2d 585 (2d Cir. 1952), from which plaintiffs cite only a concurring opinion (Plaintiffs' Brief, p. 26) defendant has in fact presented plaintiffs' performance, and has fully credited plaintiffs with their own performances, the failure to do so being the gist of that case. In Fairbanks v. Winik, 206 App. Div. 449, 201 N.Y.S. 487 (1st Dep't 1923) (Plaintiffs' Brief, p. 27) materials were added to Fairbanks' performance. Nothing of the kind transpired with respect to plaintiffs' performance here. Likewise, in Drummond v. Altemus, 60 F.338 (C.C.E.D. Pa. 1894) (Plaintiffs' Brief, p. 28) additions were made to the plaintiff's work there which simply were not his own. Finally, in Rich v. RCA Corporation, 390 F.Supp. 530 (S.D.N.Y. 1975) (Plaintiff Brief, p.30), RCA released an album containing songs recorded ten to fourteen years previously by Rich, subsequent to which his entire singing style and appearance had undergone considerable change. Nonetheless, current photographs deceptively appeared on the jacket cover, deviously attempting to pass off outworn materials as the "new" Charlie Rich. Plaintiffs' performances here are current, their appearances have not been deceptively changed, and there is no attempt to utilize any present success to capitalize on outworn, outmoded materials.

What is really in issue in the instant case is a claim of copyright infringement, a claim manifestly without merit. Plaintiffs' attempts to cover that defect with the smokescreen of the Lanham Act and unfair competition claims must not be allowed to prevail.

In sum, each of plaintiffs' attempts to assert copyright infringement, violation of the Lanham Act and unfair competition fails of its very essence. By contract rights vested in the BBC under the performers' agreements, the BBC was fully empowered to edit the recordings for worldwide distribution--including to the other major English-speaking market, the United States, where the exigencies of commercial network television would predictably necessitate cuts of obscene, prurient, scatological, homosexual, sadistic and otherwise offensive passages as well as editing for continuity and to permit commercial messages. Plaintiffs here seek, in essence, to invoke the copyright and antitrust laws and the Lanham Act to preserve the obscene aspects of their work. In this respect, they claim the exhibition of expurgated recordings of the programs infringe their copyrights and are unfair competition to the offensive originals, and that the expurgation of obscenity makes the recordings misrepresentative of their work. These contentions by the plaintiffs are unsupported in law--indeed, they fly in the face of judicial decisions and common sense, and betray plaintiffs' desperation at having failed to interdict the BBC from editing their recordings.

- d. ABC has all copyright rights in the recorded program including the right to edit to conform to recognized industry practices and customs.

Although there is no evidence in the record to so indicate, the plaintiffs claim that the BBC holds a copyright in a derivative work which does not affect the force and validity of their own copyright in the scripts. Even assuming, arguendo, that such is the BBC's copyright, no infringement has been shown.

It is clear under § 7 of the Copyright Act, 17 U.S.C. § 7 that a derivative work created pursuant to a valid license to use the underlying material creates a new copyright rule interest in the derivative work such that the proprietor of the derivative work may continue indefinitely to use the material from the underlying work as contained in the derivative work. The derivative copyright owner's copyright in the underlying work can be obtained through ratification by the parties' conduct. See Ilyin v. Avon Publications, Inc., 144 F.Supp. 368, 373 (S.D.N.Y. 1956). Accordingly, the original proprietor's assent need not be expressed nor given at the time the copyright in the derivative work is obtained.

Even if it be assumed that plaintiffs did not grant the BBC full authority to use their scripts "for all purposes" of the performers agreement, as that contract clearly mandates

(II(a), supra), a later ratification is clear. Plaintiffs' agent, Jill Foster, was aware several months prior to defendant's first broadcast on October 3 that an edited version of the recordings would be involved. In her letter of September 5, 1975 (Plaintiffs' A.127), she evidenced her knowledge of the full

extent of the editing by pointing out to the BBC precisely the length of material that would have to be omitted to allow for commercials. Far from asserting a claim of copyright infringement, plaintiffs took no action whatsoever and the recording as edited was broadcast. Having once ratified the BBC's right to use less than the entire recordings, plaintiffs have not shown anything which would be proper grounds for a revocation.

Wholly apart from the BBC's copyright in the recordings as new works under § 7, the BBC also holds a copyright in the recordings as a "joint" work, separately copy-rightable and enforceable. In Shapiro, Bernstein & Co., Inc. v. Jerry Vogel Music Co., Inc., 221 F.2d 569 (2d Cir. 1955), this Court, reversing the court below which held that the copyright there in question was in a "composite" work, which protected the new matter added by the later collaborator, stated the applicable test as follows:

"We feel that the rule...should make the test the consent, by the one who holds the copyright on the product of the first author, at the time of the collaboration, to the collaboration of the second author. ... Since the intent was to merge the two contributions into a single work to be performed as a unit for the pleasure of the hearers we should consider the result 'joint' rather than 'composite.' The result reached in the district court would leave one of the authors of the 'new work' with a barren right in the words of a worthless poem, never intended to be used alone. Such a result is not to be favored."
221 F.2d at 570.

It is clear from the terms of the performer's agreement that the plaintiffs, by collaborating with the BBC to produce the programs in each instance fully intended that their mutual efforts merge into the unitary recordings which resulted. Plaintiffs provided scripts and their services as performers, useless without the artistic direction and supervision provided by the BBC in producing, directing and providing its technical facilities for the recordings. Stage directions, music, dramatization, voiceovers and other input essential to transform a bare script into a dramatico-theatrical production are all critical ingredients, none of which plaintiffs claim to have provided. Thus, entirely independent of the BBC's copyright in the recordings as new works, it also holds an independent copyright in the joint work, entitling it to fully exploit and license the recordings.

POINT III

WHERE PLAINTIFFS HAVE FAILED TO
JOIN THOSE PARTIES THROUGH WHOM
DEFENDANT ACQUIRED ITS RIGHT TO
TELECAST PLAINTIFFS' PROGRAM, NO
INJUNCTION ENJOINING TELECAST OF
THAT PROGRAM SHOULD ISSUE

The District Court, in denying the preliminary injunction, relied in part on the ground that there exist questions of law in fact as to whether the BBC and Time-Life are indispensable parties. Indeed, equity and logic dictate that the BBC and Time-Life be joined, as parties, since it is their direct relationship with the plaintiffs -- not ABC's relationship -- which truly precipitated the dispute at issue. Accordingly, as a matter of law, this action is subject to dismissal by reason of plaintiffs' failure to join them.*

In the posture of this litigation, ABC is an innocent party which acted in complete good faith pursuant to its contractual rights with Time-Life in broadcasting the Monty Python special, which was actually edited by Time-Life and approved by ABC. Defendant acted completely within the scope of rights conferred upon it by Time-Life, which rights it had every reason to believe had been properly granted to it. In brief, the crux of plaintiffs' claim is that the right to

* Defendant, on a Rule 12 motion to dismiss, in addition to asserting failure to join indispensable parties, would allege lack of diversity jurisdiction. According to the affidavit of Nancy Lewis, plaintiff Terry Gilliam is an American residing in Great Britain. Accordingly, the District Court would lack jurisdiction. See 1 Moore's Federal Practice ¶ 0.74[4].

edit exercised by ABC exceeded the scope of those rights possessed by the BBC and which the BBC conferred upon Time-Life. Clearly, whatever rights plaintiffs may have regarding editing of the recording (i.e., the tape) that was licensed to ABC -- if they have any such rights at all -- derive directly from their agreements with the BBC.

Thus, the BBC and its direct licensee, Time-Life, are truly the critical parties from which this dispute evolves. As even plaintiffs would concede, a dominant issue involves the validity and permissible exploitation by the BBC of its copyright in the recording in view of the plaintiffs' alleged common-law copyright in the script. Where the validity of a copyright is at issue, the copyright owner is an indispensable party to an action in which its licensee seeks to sustain the validity of such copyright. See, e.g., First Financial Marketing Service Group, Inc. v. Field Promotions, Inc., 286 F.Supp. 295 (S.D.N.Y. 1968) where plaintiff, the licensee of a business form registered as "Loan Alone" -- sought a declaratory judgment that it was not infringing defendant's copyright in a certain bank loan application form. In sustaining defendant's motion to dismiss for failure to join the copyright owner (i.e., plaintiff's licensor), the Court held as follows:

"it is familiar law that the copyright owner is an indispensable party to a suit where the validity of his copyright is an issue.
[Citations omitted.]

* * *

. . . this Court must conclude that plaintiff is the assignee of something less than full ownership of the Winters copyright on the Loan Alone test form; plaintiff appears to be Winters' exclusive licensee within a limited territory

* * *

Consequently, since the validity of the Loan Alone copyright could be affected adversely to the owner thereof, Winters is an indispensable party. The test of infringement of defendant's copyright necessarily tests Loan Alone which is owned by Winters." 286 F.Supp at 298

F. R. Civ. P. 19(a), defining indispensable parties, provides as follows:

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to be Joined if Feasible.
A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

Comparable to the copyright owner in First Financial, both the BBC, as owner, and Time-Life as defendant's licensor are indispensable parties to any resolution of this dispute. Any decree in their absence will leave unresolved the remaining rights or liabilities of either or both which as a practical matter they will not be able to adequately protect unless joined. To illustrate, a determination in this action that ABC be enjoined from broadcasting the plaintiffs' material because the BBC and Time-Life lack the rights which they purported to transfer, necessarily involves a determination of those rights. Yet, without joining the BBC and Time-Life, the very parties who have the keenest interest in protecting such rights and the best knowledge as to their validity are absent.

As plaintiffs now concede in their brief -- despite their position to the contrary in the District Court -- the BBC owns the copyright in the Monty Python recordings in question. Ownership of a copyright confers upon the copyright proprietor a panoply of rights including the sole and exclusive right to exploit and enjoy the fruits of such copyright. As a practical matter, if an injunction is entered against ABC, the BBC's ability fully to exploit its copyright would be severely impaired and limited. Accordingly, the BBC -- and for comparable reasons, Time-Life as well -- must be joined as parties, so that a complete determination, at which all interested parties are before the Court, may be had. Most significantly,

defendant will be subject to inconsistent liability if the BBC and Time-Life are not joined. Any determination adverse to ABC would be predicated upon the invalidity of the license from the BBC and/or Time-Life. To the extent, however, that defendant might have recourse against its licensors, neither the BBC nor Time-Life would be bound by such determination unless they are parties. If the BBC and Time-Life were able to sustain their position in a subsequent claim, ABC would find itself in the inequitable position of having inconsistent adverse determinations rendered against it. Joinder of the BBC and Time-Life would avoid this possibility and properly place all concerned parties before the Court.

Also, the BBC's contract with Time-Life was not limited solely to the Monty Python shows but rather grants Time-Life rights to distribute all of BBC's programs throughout the United States. The contracts entered into between the BBC and plaintiffs are standard form contracts which presumably are utilized with innumerable other performers. The BBC, if its grant as exercised by defendant is held invalid, will thus face a situation where virtually every other performer under contract to it can commence an action similarly asserting the invalidity of the rights granted to Time-Life. The situation which Time-Life faces is analogous, as the same performers will be similarly encouraged to challenge the rights which it granted or will grant to other networks or distributors with respect to all other BBC programs which it

distributes.

In short, the BBC and Time-Life should be joined as parties to this action and no application for injunctive relief should be entertained or issues determined without them being joined.

CONCLUSION

By reason of the foregoing, defendant submits that the Order of the District Court issued on December 19, 1975 denying plaintiffs' application for a preliminary injunction should be in all respects affirmed.

Respectfully submitted,

PRYOR, CASHMAN & SHERMAN
Attorneys for Defendant-
Appellee-Appellant

Of Counsel,

Gideon Cashman
Stephen F. Huff
Joseph Z. Epstein
Paul M. Eichengrun

APPENDIX

NNNN

A 1

RECEIVED

PLAINTIFFS' EXHIBIT 1

ZCZC RGB0551 RMD6885 VR0167 CTE437 LBE042 SVE02:BOB SHANKS

NOV 21 1975

URRG HL GELB 070

LONDONLB 70 20 2350 F1/50

LT

BOB SHANKS ABC-TV

NEWYORK(10019)

(Del 1330 6 Ave)

HAS EDITING BEEN DONE FOR SECOND MONTY PYTHON WIDE WORLD
SPECIAL (STOP) IF SO MAY WE SCREEN RESULTS IN LONDON
OR IF NOT YET DONE, PYTHONS WOULD LIKE TO EDIT FOR YOU (STOP)
WE STAND BY AND WOULD APPRECIATE IF YOU WOULD ADVISE US SOON

COL LT (10019)

Connaught Hotel

PAGE2/20

(STOP) PLEASE CONTACT ME CARE OF CHURCHILL HOTEL PORTMAN
SQUARE LONDON W.1 ROOM 725 REGARDS

NANCY LEWIS FOR MONTY PYTHON

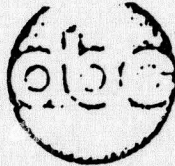
COL W.1 723

*Contact Charles Simpson Daily Times/Life.
He will be Connaught Hotel, London, Dec. 1.
Regards.*

A 2
PLAINTIFFS' EXHIBIT 2

FOR COMMUNICATIONS CENTER

TS Ex 2



- ☒ URGENT - IMMEDIATELY
☒ RUSH - 1 HOUR OR LESS
☐ PRIORITY - 2 TO 4 HOURS
☐ NORMAL - 4 TO 12 HOURS
☐ DEFERRED - 12 HOURS OR OVER NIGHT

FROM: AMERICAN BROADCASTING COMPANY, INC.

TO: • NANCY LEWIS
• CHURCHILL HOTEL
• PORTMAN SQUARE
LONDON W. 1 (ROOM 723)

CONTACT CLARE SIMPSON TIME/LIFE.

HE WILL BE CONNAUGHT HOTEL, LONDON, DEC. 1

REGARDS,

BOB SHANKS

A 3
DEFENDANT'S EXHIBIT A

1-4
PCO7

PROGRAMME PYTHON PLAYHOUSE 6 Programmes

PERFORMANCE DATE (live or recorded)

12,19,26 Oct., 2,9,16 November, 1974.

MAIN ENGAGEMENT PERIOD:-

PART TO TAKE PART AS REQUIRED

01154/2451 - 6

PROJECT No.

6-19
101

120 00
per prog.

GUARANTEED-FEE
Type I special

ADDITIONAL RECORDING DAYS

PRE/POST RECORDING DAYS

One week prior to each rec.
day Dates, times & locations
to be notified.

Filming availability from 9
Sept 1974 to be paid at normal
BBC/Equity rates.

All monies (and in addition
VAT if invoiced) in connec-
tion herewith to be paid to
Fraser & Dunlop Ltd. unless
the BBC and the contributor
otherwise agree.

20-26

120 00
per prog.

TOTAL
One hundred & twenty pounds.

PERCENTAGE OF AGGREGATE FEE PAYABLE FOR EACH
RE-BROADCAST ACTUALLY GIVEN UNDER CLAUSE II(e): 75%

120 00
per prog.

AGGREGATE FEE

(Or at any other place(s) or time(s) the BBC may direct)

SIGNED on behalf of the BBC

SPECIAL ACTIVITIES

PRODUCER IAN MACRAUGHTON

Normal Country of Residence (if not UK) of each Artist covered hereby.

(HEAD OF ARTISTS' CONTRACTS, TELEVISION)

I agree to carry out this engagement on the terms and conditions offered. I further accept that (subject to payment in accordance with the BBC's Agreement with British Actors' Equity Association ("Equity") which sets out minimum payments - see clause II (g) overleaf), the BBC may transmit or authorise the transmission of recordings made hereunder (from transmitters outside the United Kingdom anywhere in the world excluding Hill

Date

17-10-74

Artist's Signature

NATIONAL INSURANCE DECLARATION

Please complete this Form as failure to do so may result in incorrect insurance deductions from your fee(s).

1. I hereby certify that to the best of my knowledge and belief the engagement(s) including rehearsal(s), described above Will / Will not (delete one) be my first employment as an employed person in the week(s) concerned.

2. The total compulsory weekly contribution for an employed person (Class 1) printed on my card is

Date

17-10-74

Artist's Signature (also required here)

If "Will" is deleted, delete also No.2. If "Will not" is deleted complete No.2.
For insurance purposes, the week runs from Monday morning to Sunday night.

If your engagement(s) for the BBC total 8 hours or less in any one week you will only qualify for an Industrial Injury Stamp.

N.B. If you are informed that an insurance deduction(s) has been made from your fee, will you please send your card for stamping at the end of the appropriate quarter, but do not send with this contract.

5-62

3-64

Terry Gillian Esq.,
c/o Fraser & Dunlop Ltd.,
91 Regent Street,
London, W.1.

27-33

34

ARTIST'S NUMBER

65-70

PERF. DATE

71-74

E1

INSURANCE

75-78

C1

(Accounts Use Only)

P/413 873

NOTE TO ARTIST: Signed Acceptance to be returned to BBC Signatory at address above.

1. A broadcast (whether live or by means of recordings) from every transmitter of the BBC Television Network in which the programme was originally broadcast or rebroadcast either simultaneously or at different times within the period of two years from the date of the original broadcast (b) to give or authorise the giving of simultaneous and deferred international relays subject to any agreement for the time being in force between the BBC and such other parties as have any right or interest therein. The word "recording" shall mean any contrivance whereby the performance(s) may be mechanically reproduced. The "United Kingdom" shall include the United Kingdom of Great Britain and Northern Ireland the Isle of Man and the Channel Islands.
2. The Artist shall rehearse and perform to the best of his skill and ability and carry out all reasonable instructions given to him by the BBC.
3. (a) The Artist agrees to being "made up" by a person selected by the BBC if the BBC shall so require. (b) The Artist shall attend in person (i) dressed made up and ready to perform not less than fifteen minutes before the time notified to him for his performance(s) and (ii) such rehearsals and special tests photocalls and other attendances as may be required and shall not perform elsewhere at the times fixed for such performance(s) rehearsals and other attendances. Such times may be varied by the BBC at its discretion.
4. The Artist is required to provide his own modern costume(s) (including evening dress where necessary) and other normal articles of modern attire and/or in the case of variety and cabaret artists and other "specialty" performers any character or special costume uniform wigs and other accessories normally used by the Artist for professional purposes. The BBC will supply any necessary costumes articles of attire and accessories which according to the circumstances of each case the Artist cannot reasonably be expected to

possess or which the BBC would prefer worn to any costume(s) or article(s) of modern attire provided by the Artist and the Artist agrees to wear any costumes, articles of attire and accessories supplied by the BBC.

5. The Artist agrees that his signed acceptance will be sent to the BBC BY RETURN of post.
6. The Artist agrees to abide by all rules and regulations which may from time to time be made by the BBC and notified to him for the regulation and conduct of rehearsals or broadcasting and that he will not interfere in any manner with other Artists or the employees of the BBC and that no remark or interjection shall be incorporated in his performance(s) which has not been passed by the BBC.
7. The Artist shall not at any time use the name "British Broadcasting Corporation" or the initials "BBC" in a manner likely to give the impression that any performance given by the Artist otherwise than for the BBC is authorised by or connected with the BBC.
8. The Artist shall not be entitled to any rights in any character or pseudonym which the BBC may provide for the Artist to use for the purposes of this Agreement and the Artist shall not use such character or pseudonym for any other purposes without the previous written permission of the BBC.
9. The Artist warrants that he has not concealed any change of professional name or description and that at the time of signing this Agreement he is not bound by any contract which can preclude him from fulfilling this Agreement and the Artist agrees that during the continuance of this Agreement he will not enter into any such contract.
10. The BBC shall not be liable to the Artist or to the legal personal representative of the Artist for any loss

damage or injury to the Artist's person or property during or in connection with this engagement unless caused by the negligence of the BBC and recoverable on that ground.

11. The BBC shall be entitled to make recordings of the performance(s) or of any rehearsal and of performance(s) or interviews specially given for use as trailers *and without further payment*:

- (a) to use the recordings for its private purposes;
- (b) to broadcast extracts from the recordings in programmes of an historic or reminiscent nature;
- (c) to broadcast either the performance(s) or recordings thereof once only;
- (d) to broadcast as trailers extracts from recordings and/or "live" extracts from any rehearsal and/or recording period and

upon payment of an additional fee as provided overleaf and in the BBC's Agreement(s) with Equity:—

- (e) to broadcast the recordings twice only during a period of two years from the date of any broadcast under sub-clause (c) of this Clause;
- (f) to broadcast as trailers "live" and/or record for later broadcasting performance(s) given specially for trailer use on any day in respect of which no payment for rehearsal and/or recording would otherwise be due to the Artist;
- (g) to transmit or authorise the transmission of the recordings from any transmitter to any part of the world other than the United Kingdom or to show or authorise the showing of the recordings to non-paying audiences throughout the world subject to any limitations in the Agreement(s) between the BBC and Equity for the time being in force and for the BBC's purposes to substitute (if required) for the Artist's voice the voice of any performer in any language other than that in which the performance was given.

The BBC may also use recordings of the performance(s) of the Artist hereunder in accordance with the terms of any Agreement between the BBC and Equity which may for the time being be in force and applicable. All fees specified herein shall unless otherwise stated be exclusive of V.A.T. if this is relevant.

12. The programme title(s) stated overleaf may be changed at the discretion of the BBC.
13. Recordings of the broadcast performance(s) may without payment be used by the British Film Institute and made and used by the British Institute of Recorded Sound for their respective private purposes.
14. (a) The Artist hereby warrants that any manuscript or unpublished work costumes properties exhibits choreography and/or other programme material whatsoever provided by the Artist for his performance shall unless otherwise agreed by the BBC be either:—
 - (i) original material of his own which he is fully at liberty to use for all purposes of this Agreement without the licence or permission of any other person; or
 - (ii) original material which he is fully at liberty to use for all the purposes of this Agreement by reason of his holding all necessary licences or permissions.
- (b) The Artist shall if required produce with his suggested programme an assignment licence or other satisfactory evidence from the author composer or other owner of any such programme material that he has the right to use it for the above purposes.
- (c) The Artist shall be responsible for all payments in respect of any such manuscript or unpublished

A 8
Defendant's Exhibit A

work and other programme material with the exception of any musical work the rights in which are controlled by a collecting society on behalf of a party other than the Artist.

- (d) Permits to mimic or impersonate other Artists must be produced if required.
 - (e) The BBC shall be responsible only for payments in respect of:
 - (i) manuscript or unpublished works or other programme material provided by the BBC.
 - (ii) approved manuscript or unpublished work or other programme material provided by the Artist if the rights therein are controlled
 - (f) Manuscript or other programme material provided for the Artist by the BBC is strictly copyright and the Artist shall not employ such manuscript or other programme material or any part of it for any performance he may render for any party other than the BBC without the express written permission of the BBC in each case.
15. The Artist further warrants that his performance(s) shall not contain anything defamatory or anything calculated to bring the BBC into disrepute and that it shall not contain any advertisement or anything of an advertising character.
16. The Artist undertakes that he will not disclose to any other party any information relating to the BBC's programme arrangements which he has been or may be specifically requested by the BBC not so to disclose and that he will at all times keep the BBC fully indemnified in respect of all actions proceedings claims demands and expenses whatsoever which may be made or brought against or suffered or incurred by the BBC in consequence of any breach of his obligations hereunder or on the ground that any such material as aforesaid is an infringement of any rights of any other person or is defamatory.

17. In the event of the Artist alleging inability to perform by reason of illness or physical incapacity the certificate of a fully qualified medical practitioner proving the fact of such inability to perform shall forthwith be sent to the BBC by the Artist stating the nature of the illness or physical incapacity and that as a result the Artist is unable to perform. The BBC is in this event not liable to pay any fee or remuneration to the Artist except for performance(s) actually given by him hereunder.
18. If the Artist for any reason (except illness or physical incapacity duly certified as hereinbefore provided or such other unavoidable cause as may be proved to the reasonable satisfaction of the BBC) fails to appear and perform as stipulated in this Agreement he shall pay (besides any extra cost of a deputy and any extra payment made to other performers or staff concerned in the same performance and any other directly provable expenses to which the BBC has been put by the Artist's failure) such sum as may be assessed by the BBC as fair and reasonable in the circumstances of the breach or in the event of a dispute such sum as may be assessed by an independent arbitrator to be appointed by both parties in accordance with the terms of the Arbitration Act 1950, or subsequent amendments, as damages in respect of the disruption caused to the BBC and its employees in rearranging the performances or arranging for a substitute programme, but nothing in this Clause shall effect the right of the BBC to apply for an injunction to restrain the Artist from performing in breach of this Agreement or the right of the BBC to determine this Agreement as hereinafter provided.
19. The BBC reserves the right to publish or to refrain from publishing the Artist's name and without stating its reasons to cancel or curtail at any time the Artist's performance and any publicity relating thereto sub-

ject to the payment by the BBC to the Artist of the agreed engagement fee and such payment shall be in full discharge of the BBC's liability and the Artist shall have no further claim whatsoever upon the BBC.

20. Where this Agreement relates to a combination of two or more performers the Artist shall at the time when the Agreement is signed furnish the BBC in writing with such names of performers as the BBC may require and shall not substitute a performer for a person so named without the written permission of the BBC. The Artist warrants that he is authorised in writing by the other member(s) of the combination to give his/their consent to be bound by the conditions of this Agreement and that, if not so authorised, the Artist will obtain such written consent before the date of the performance(s). The Artist agrees to pay each member of the combination the proportion of any fee payable to the Artist hereunder (including any fee payable under Clause 11 hereof) to which the member is entitled.
21. If (a) in the opinion of the BBC it is advisable for reasons arising from abnormal circumstances to institute a general change in the BBC programme arrangements or (b) any one or more performances under this Agreement are prevented by force majeure or by any cause whatsoever beyond the reasonable control of the BBC or (c) there shall be any breach or non-observance by the Artist of any of the terms or conditions of this Agreement, then and in any of such cases the BBC may forthwith determine this Agreement and the Artist shall have no claim upon the BBC for remuneration (other than a proportion assessed by the BBC for work actually carried out) expenses costs damages compensation or otherwise. Where this engagement is for more than one appearance or performance and any appearance(s) or performance(s) is/are prevented or delayed by any cause whatsoever outside the reasonable control of the BBC then the BBC may alternatively in its discretion treat

this Agreement as being determined under this Clause as regards the particular appearance(s) or performance(s) which is/are prevented or delayed without in any way affecting the provisions of this Agreement as regards any other appearances or performances hereunder. Any determination under this Clause shall be without prejudice to any other rights or remedies of the BBC.

22. Additional conditions applying to Variety and Specialty performers and also, if appropriate, to other performers:—

- (a) (i) No fee or other valuable consideration shall be solicited received or accepted directly or indirectly from any party other than the BBC for or in recognition of the Artist singing performing or having sung or performed or promising to sing or perform any particular item song or musical work or for refraining from singing or performing any particular item song or musical work at/or in connection with this engagement.
- (ii) No remarks shall be broadcast which in the BBC's opinion will draw undue attention to any particular item song or musical work. If any such remark be made except with the BBC's consent and in the form approved by it this engagement shall forthwith determine and such action shall be considered a breach of Contract. A statement that any particular item song or musical work is being performed "by request" or an announcement to similar effect shall be deemed to draw undue attention to the item song or musical work concerned. Any breach of the provisions of this clause will result in a ban against further engagements from the BBC.

- (b) The Artist shall (where appropriate and unless otherwise agreed) provide his own material and the BBC shall have the absolute right to accept or reject all or any part of the programme submitted by the Artist and shall not be called upon to give any reasons for such acceptance or rejection. If the BBC rejects all or any part of such programme the Artist shall with all despatch submit for the acceptance of the BBC other material in place of that rejected. The Artist shall not make alteration in the programme accepted by the BBC without the previous written permission of the BBC.
 - (c) All electric and electronic musical instruments must be provided with 3 core leads and 5 or 13 amp 3-pin plugs and the exposed metal work must be properly connected with the earth pin of the plug.
23. Any notice under this Agreement may be served upon the Artist by posting the same to his last known address or to his agent (if any) through whom this Agreement is made.
- NB. Fees will be paid by cheque either at the time of the performance or sent to the Artist's address before stated as soon as possible thereafter. Cheques are sent at the risk of the Artist in all respects after posting.

**MONTY PYTHON SUING
TO STOP TV SPECIAL**

Monty Python, the British comedy team, filed suit in Federal District Court yesterday to prevent ABC-TV from broadcasting a Monty Python special on Dec. 26.

The six members of the group claim in the suit that ABC has

"substantially altered the artistic nature" of their material "by deleting substantial" portions and that the remaining excerpts do "not truly represent the entertainment talents" of the group.

Monty Python is seen regularly on 120 public television stations in the United States. ABC-TV bought six programs which it had planned to televise on two 90-minute segments as part of its late night "Wide World Special" series. The first one was shown on Oct. 3.

Richard Gidder, ABC-TV director of broadcast standards and practices-East Coast, explained that portions of the program had been deleted that the network felt were "inappropriate" including some scenes of seminudity. The deletions, he said, were made in consultation with Time-Life Films, the program's distributor here.

REMEMBER THE NEEDIEST!

'Pythons' Sue ABC To Stop 'Mutilation'

The principals of "Monty Python's Flying Circus" have filed a complaint against ABC-TV in U.S. District Court in New York, claiming that the web's later-night 90-minute "Python" special in October "mutilated" their work, and are asking the court to issue a preliminary injunction to halt the Dec. 26 ABC showing of a similar program.

The Pythons — Terry Gilliam, Graham Chapman, Terry Jones, Michael Palin, John Cleese and Eric Idle — asked for \$500,000 in damages and \$500,000 for "unfair competition."

The programs originally were made for the BBC, and Time-Life has sold them in the U.S. primarily to public tv stations. All showings have been uninterrupted by commercials and unedited, even on the couple of commercial stations that have carried the series.

In selling the six shows to ABC for two 90-minute "Wide World Of Entertainment" late-nighters, T-L advised on cuts. But there apparently was a failure of communication somewhere along the line, as the Pythons included in their court filings copies of assurances from the BBC that no editing of the shows on ABC would be permitted.

"The deletion of any portion of any episode from a public performance substantially alters the artistic nature of the material and the quality of the professional services of the group," the court filing said, claiming that control rights were never turned over to the Pythons.

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NEW YORK POST, TUESDAY, DECEMBER 16, 1975

Monty Python Vs ABC-TV

Monty Python's Flying Circus is trying to stop the ABC-TV network from airing three ABC-edited segments of the British comedy series on the day after Christmas.

A petition filed in Manhattan federal court yesterday asks that ABC be barred from showing the segments, each originally 30 minutes long, unless they are shown in their entirety "as originally written and performed . . . and broadcast by the British Broadcasting Corp."

A hearing was set for today.

Monty Python To N.Y. City Center

London, Dec. 16.

The Monty Python comedy troupe is set for a three-week stand at the City Center, N.Y., opening April 12 as a presentation of Arthur Cantor. The English show, which has toured Britain and Canada, comprises film clips, slides and live sketches in a free-wheeling format.

Monty Python, whose public broadcasting tv series and current feature film release have developed a substantial cult following, consists of writer-performers John Cleese, Graham Chapman, Terry Gilliam, Eric Idle, Terry Jones and Michael Palin.

(The Python show is carried by Channel 13 in New York and Public Broadcasting Service stations in some other U.S. cities. -Ed.)



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TERRY GILIAM, et al.,

Plaintiffs-Appellants-
Appellees,

vs.

AMERICAN BROADCASTING COMPANIES,
INC.,

Defendant-Appellee-
Appellant.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes
and says that he is over the age of 18 years. That on the 5th
day of April, 1976, he served two copies of
Brief and Appendix for Defendant-Appellee-Appellant
on Abeles, Clark & Osterberg, Esqs., the attorneys
for Plaintiffs-Appellants-Appellees
by delivering to and leaving same with a proper person in charge of
their office at 4 East 52nd Street
in the Borough of Manhattan, City of New York, between
the usual business hours of said day.

David F. Wilson

Sworn to before me this

5th day of April, 1976.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978